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No. 80-767

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, APPELLANT

v.

EDWIN D. LEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

REPLY BRIEF FOR THE UNITED STATES

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1. Appellee argues (Br. 5) that "the cost for religious tolerance would be small, while the benefit to [him] in providing religious freedom for him would be great" if the social security tax could not constitutionally be applied to persons who object, on religious grounds, both to the payment of taxes levied to support such benefits and to the receipt of such benefits. But, as we have pointed out in greater detail in our opening brief, the tax statute appellee seeks to invalidate neither prohibits the practice of his religion nor threatens the integrity of his religious beliefs. The Free Exercise Clause has never been construed to interfere with such a fundamental

societal activity as the levying of generally imposed federal taxes. Instead, this Court has repeatedly observed that a generally imposed income tax does not have a prohibited coercive effect on religious practices or beliefs. *Follett* v. *Town of McCormick*, 321 U.S. 573, 577-578 (1944); *Murdock* v. *Pennsylvania*, 319 U.S. 105, 112 (1943). "To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, *i.e.*, legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature." *Braunfeld* v. *Brown*, 366 U.S. 599, 606 (1961) (plurality opinion).

The result should be no different here because this case involves the FICA and FUTA taxes used to fund social welfare programs in which appellee (and, perhaps, his employees) would choose not to participate. Congress did not have to enact those taxes to obtain revenues for the social security benefit programs, but could have chosen instead to obtain the necessary funds from the income tax or other general taxes. Although appellee states (Br. 10) that the Amish do not object to payment of the income tax, a substantial portion of the revenues derived from that tax is in fact used to support various social welfare benefit programs. See our opening brief at 23, n.11. Since members of the Old Order Amish sect could become eligible for benefits under those programs, appellee's challenge to the FICA and FUTA taxes stands on the same footing as a challenge to the general income tax. Congress has wide latitude to determine how to secure revenues (see *Fernandez* v. *Wiener*, 326 U.S. 340, 352 (1945)). There is accordingly no reason why it should make a difference what kind of tax Congress chooses to impose to support the payment of social security benefits. The

FICA and FUTA taxes, like the income tax, are general obligations imposed on every person who meets the statutory requirements and are entirely neutral with respect to religion. As the Ninth Circuit observed in *Autenrieth* v. *Cullen*, 418 F.2d 586, 588-589 (1969), cert. denied, 397 U.S. 1036 (1970), in terms that are equally applicable here—

> If every citizen could refuse to pay all or part of his taxes because he disapproved of the government's use of the money, on religious grounds, the ability of the government to function could be impaired or even destroyed. See, for example, *Crowe* v. *Commissioner of Internal Revenue*, 8 Cir., 1968, 396 F.2d 766, where a taxpayer declined to pay his income tax because he objected to being made 'to contribute to the welfare of people who made no effort to support themselves.' There are few, if any, governmental activities to which some person or group might not object on religious grounds.

2. Finally, if appellee's claim to exemption from employer's social security taxes were upheld, the result would be to encourage him to limit his hiring to members of the Old Order Amish sect who would not object to the absence of social security coverage. While Congress might choose to confer the exemption appellee seeks, it surely is not constitutionally compelled to do so, where the consequence would be to foster hiring on the basis of religion. As the plurality observed in an analogous context in *Braunfeld* v. *Brown*, *supra*, 366 U.S. at 609, in rejecting a constitutional claim of exemption from the Sunday closing laws for persons who observe another day of rest, "in order to keep the disruption of the day at a minimum, exempted employers would probably have to hire employees who themselves qualified for the

exemption because of their own religious beliefs, a practice which a State might feel to be opposed to its general policy prohibiting religious discrimination in hiring [footnotes omitted]". Here, even if there is no legal impediment to respondent's choosing to restrict employment to members of his own sect,[1] Congress is not constitutionally required to provide him with an economic incentive to do so.

For the reasons stated above and in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted.

REX E. LEE
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[1] See 42 U.S.C. 2000e(b) and 2000e-2(a) (prohibiting discrimination on the basis of religion by employers of fifteen or more persons); Pa. Stat. Ann. tit. 43, § 955 (Purdon Supp. 1980) (prohibiting discrimination on the basis of religion by employers of four or more persons).

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